



FEDERAL ELECTION COMMISSION
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2009 JUN 24 P 5:12

June 24, 2009

MEMORANDUM

TO: The Commission

FROM: Vice Chairman Matthew S. Petersen *MSP*
Commissioner Caroline C. Hunter *CC+1*
Commissioner Donald F. McGahn II *DFM*

Subject: Proposed Rule of Agency Procedures: Advisory Opinions

AGENDA ITEM
For Meeting of: 06-25-09

SUBMITTED LATE

Attached is a proposed rule of agency procedure. We have asked to place this draft on the agenda for June 25, 2009.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 112**

3 **[Notice 2009—XX]**

4 **Advisory Opinion Procedure**

5 **AGENCY:** Federal Election Commission

6 **ACTION:** Notice of New Advisory Opinion Procedure and Explanation of
7 Existing Procedures

8 **SUMMARY:** The Commission is establishing a program to allow persons
9 requesting an advisory opinion, or their counsel, a limited opportunity
10 to appear before the Commission. The purpose of their appearances
11 is to answer questions from the Commission at the open meeting
12 during consideration of the requestor's draft advisory opinion.

13 **DATES:** The program will be in effect immediately upon publication.

14 **FOR FURTHER
15 INFORMATION**

16 **CONTACT:** Mr. Robert M. Knop, Assistant General Counsel, or Mr. Neven F.
17 Stipanovic, Attorney, 999 E Street, NW, Washington, DC 20463,
18 (202) 694-1650 or (800) 424-9530.

19 **SUPPLEMENTARY INFORMATION:** The Federal Election Commission is implementing
20 a program allowing persons requesting advisory opinions, or their counsel, to answer questions
21 at the open meeting during consideration of an advisory opinion draft.

22

1 **I. Background**

2 On January 14 and 15, 2009, the Commission held a public hearing on possible changes
3 to a number of its policies, practices, and procedures, including possible changes to the advisory
4 opinion process. Information about the hearing is available on the Commission Web site at
5 <http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml>. The Commission
6 received several public comments regarding the advisory opinion process. One issue generating
7 significant attention was whether advisory opinion requestors or their counsel should be allowed
8 to appear before the Commission during the advisory opinion process. After reviewing the
9 public comments, the Commission has decided to allow requestors or their counsel to appear at
10 the open meeting during consideration of an advisory opinion draft. The specific procedures are
11 explained below.

12 A. Existing Advisory Opinion Procedures

13 Any person may request an advisory opinion concerning the application of the Federal
14 Election Campaign Act of 1971, as amended (“Act”), or Commission regulations to a specific
15 transaction or activity by the person.¹ See 2 U.S.C. 437f; 11 CFR Part 112. Requestors or their
16 counsel (*hereinafter*, “Requestors”) must submit their request in writing. 11 CFR 112.1. The
17 Commission, in turn, must issue an advisory opinion within 60 days of receiving a complete
18 advisory opinion request. 2 U.S.C. 437f(a)(1). The 60-day deadline is reduced to 20 days when
19 a Federal candidate or a candidate’s authorized committee submits a complete request within 60
20 days of a Federal election. 2 U.S.C. 437f(a)(2). At times, the Commission expedites certain
21 highly significant time-sensitive requests and issues these advisory opinions within 30 days.

¹ The Act defines “person” as an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, 2 U.S.C. 431(11).

1 (See also Section I(E), *infra*.) Advisory opinions are issued if approved by at least four
2 Commissioners.

3 Members of the public have two distinct opportunities to participate in the advisory
4 opinion process. First, they may submit written comments on the advisory opinion request,
5 which is released to the public and posted on the Commission's Web site as soon as it becomes
6 complete. 11 CFR 112.2; 11 CFR 112.3. Second, they may submit written comments on a draft
7 advisory opinion, which typically is provided to the Requestor and made available to the public
8 prior to the Commission meeting at which the advisory opinion will be considered.

9 B. Proposed Revisions to the Advisory Opinion Process

10 At the public hearing held on January 14 and 15, 2009, those commenters who addressed
11 the advisory opinion process generally agreed that the Requestor should be allowed to appear
12 before the Commission when the Commission considers the advisory opinion draft. The main
13 concern with the existing advisory opinion process was the Requestor's inability to respond to
14 Commissioners' questions during the open meeting. The commenters noted that when they
15 represented requestors, they sometimes found it frustrating to sit in the audience during the open
16 meeting when the Commission was considering their request, with no opportunity to respond
17 when Commissioners raised questions. To address this concern, the Commission is
18 implementing a new procedure that would allow Requestors to appear before the Commission to
19 answer questions at the open meeting when the Commission considers the Requestor's draft
20 advisory opinion.

21 The Commission believes that this procedure will promote transparency and fairness,
22 while ensuring that advisory opinions continue to be issued in an efficient and timely manner. It
23 would permit the Requestors to answer directly Commissioners' questions. These appearances

1 may clear up ambiguous or conflicting statements in the Requestors' written submissions or
2 allow the Commission to obtain additional information where the Requestor's previous
3 discussions with Office of General Counsel ("OGC") attorneys did not provide an answer.
4 Allowing Requestors to appear would help ensure that the Commission fully considers all
5 significant aspects of the proposed transaction or activity before voting on the advisory opinion.
6 Appearances by Requestors may also help some Requestors to understand better the basis for the
7 Commission's decision.

8 Some commenters suggested that the Commission should hold formal oral hearings on
9 advisory opinion requests, similar to the probable cause hearings the Commission holds in
10 enforcement matters, before it considers and votes on draft advisory opinions. See Procedural
11 Rules for Probable Cause Hearings, 72 FR 64919 (Nov. 19, 2007). The Commission believes
12 that a broader opportunity for an oral presentation is not needed and would prove unworkable
13 within the short statutory deadlines for issuing advisory opinions. These 60- and 20-day
14 statutory deadlines preclude more extensive oral hearings at an earlier point in the process. The
15 Commission would have to devote significant resources to arranging and preparing for oral
16 presentations, thereby reducing the already limited time available for drafting and considering
17 opinions responding to advisory opinion requests. While extensions may be arranged if
18 necessary, as the Commission has done in the past, allowing extensions on a regular basis could
19 undermine the statutory directive to issue advisory opinions within 60 or 20 days. Furthermore,
20 because Requestors already have multiple opportunities to participate in the advisory opinion
21 process, an additional oral hearing would not significantly benefit them or the advisory opinion
22 process.

1 One commenter at the public hearing suggested that third-party commenters in the
2 advisory opinion process should be allowed to appear before the Commission; other commenters
3 disagreed. The Act specifically provides that the Commission shall issue an advisory opinion
4 “with respect to a specific transaction or activity by the person” who submitted the request. 2
5 U.S.C. 437f(a)(1). Accordingly, under the new program, third-party commenters would not be
6 allowed to make oral presentations. Requestors would be permitted to appear only for the
7 limited purpose of addressing questions raised by the Commission. Commenters already have an
8 opportunity to submit written comments on the request, as well as on the draft advisory opinion.
9 Moreover, arranging an oral hearing within the 60- or 20-day statutory deadlines for all
10 interested parties who wish to testify would be inefficient and impractical.

11 Another issue raised at the public hearing was whether the Commission should transcribe
12 oral presentations if it allowed Requestors to appear. The Commission currently does not
13 transcribe open meetings, and the Commission does not intend to change this practice when
14 requestors or their counsel make an appearance for two reasons. First, the transcripts would be
15 an expense to the Commission while offering little added benefit to the requestor. Second, the
16 Commission already has podcasts of its open meetings available on the Commission Web site.

17 C. Notice of Intent to Appear Before the Commission

18 Requestors wishing to appear before the Commission to answer questions regarding their
19 advisory opinion request shall have the opportunity to do so. Requestors must submit a written
20 notice to the Commission in advance indicating that they will be available to respond to
21 questions at the open meeting at which the advisory opinion request is to be considered. The
22 notice must be received by the Office of the Commission Secretary (“OCS”) by email, hand
23 delivery, or fax no later than 48 hours prior to the scheduled open meeting. Requestors are

1 responsible for ensuring that OCS timely receives the notice. In the event any advisory opinion
2 draft response is not made available to the public and to the Requestor within one week (3 days
3 for requests under the 20-day expedited procedure) prior to the Commission open meeting at
4 which the advisory opinion request is to be considered, the Requestor shall have an automatic
5 right to appear before the Commission, and no advance notice shall be required. (*See also*
6 Section I(E), *infra.*)

7 The opportunity to appear before the Commission does not guarantee that Requestor will
8 be able to address the Commission if no Commissioners have any questions of the Requestor.
9 These appearances are voluntary and no adverse inferences will be drawn if Requestors do not
10 appear.

11 D. Open Meeting Procedures

12 Requestors who appear before the Commission shall take a seat at the witness table
13 during consideration of their advisory opinion and respond to any questions Commissioners may
14 have. Requestors who are unable to appear physically at an open meeting may participate
15 remotely, subject to the Commission's technical capabilities. To ensure availability, Requestors
16 wishing to participate remotely are advised to notify the Commission Secretary when they
17 submit their notice of intent to appear.

18 Requestors' appearance is limited to answering Commissioners' questions; it is not an
19 opportunity for Requestors to make extended oral presentations. The Commissioners, the
20 General Counsel, and the Staff Director may ask Requestors questions appropriate or relevant to
21 answering the advisory opinion request at hand. Commissioners also may ask the General
22 Counsel and the Staff Director questions pertaining to the request. Any factual representations

1 made at the open meeting will be considered definitive in the formulation of a final advisory
2 opinion.

3

4 E. Improving Transparency and Timeliness of Advisory Opinion Procedures and
5 Opportunity for Comment

6 In an effort to streamline the advisory opinion request process and to improve
7 transparency and meaningful opportunity for public comment and Commission consideration of
8 such comments, the Commission informally has implemented several procedures and proposes
9 additional procedures explained below.

10 Commission Self-Imposed Deadline for Draft Responses

11 In 1993, the Commission announced pilot procedures that would result in advisory
12 opinion drafts to be made public for comment as soon as they are circulated to the Commission,
13 and generally no later than close of business on the Thursday preceding the Commission's next
14 open meeting at which the advisory opinion request is to be considered (generally the following
15 Thursday). *See* Revision to Advisory Opinion Comment Procedure, 58 Fed. Reg. 62259 (Nov.
16 26, 1993). The timetable was to remain in effect for all advisory opinion requests received until
17 May 31, 1994, and did not apply to expedited requests under 2 U.S.C. 437f(a)(2) and 11 C.F.R.
18 112.4(b) (*see infra*).

19 In this same spirit, for all advisory opinion requests subject to the 60-day deadline, the
20 Commission will provide at least one draft response to the Requestor and the public no later
21 than one week prior to the Commission open meeting at which the advisory opinion will be
22 considered. This timetable will provide Requestors adequate time to decide whether to submit a
23 notice to the Commission to appear at the meeting, as well as provide the public meaningful

1 opportunity to submit comments on the draft and for the Commission to properly consider any
2 such comments. For requests subject to the 20-day deadline (*see infra*), this timetable shall be
3 shortened to provide a draft response no later than three business days prior to the open meeting
4 at which the advisory opinion will be considered.

5 The Commission notes that, prior to the open meeting, additional advisory opinion draft
6 responses may be produced after the initial draft(s) is released publicly. The Commission will
7 make available to the public and to Requestors any and all additional draft responses as soon as
8 possible. In the event any draft response is not released publicly until after the one-week / three-
9 day deadlines, Requestors shall have an automatic right to be heard at the meeting (limited to
10 answering the Commissioners' questions, if any; *see supra*).

11 The timetable described above is in addition to the existing 10-day deadline for accepting
12 written public comments following the date the advisory opinion *request* is made public. *See* 2
13 U.S.C. 437f(d).

14 Expansion of 20 Day Expedited Process in Section 112.4(b) to Other Requestors

15 The Commission has an expedited procedure provided for in 2 U.S.C. 437f(a)(2) and
16 implemented in 11 C.F.R. 112.4(b) for certain AOs. This expedited procedure is currently
17 limited to any candidate or authorized candidate's committee who: (1) submits a request within
18 60 calendar days preceding the date of an election for Federal office; (2) presents a specific
19 transaction or activity related to the election; and (3) explains in the request the electoral
20 connection. The Commission recognizes that this procedure does not apply to other entities or
21 individuals, and in recognition of this will attempt to apply an expedited schedule to any entity or
22 individual who, within 60 calendar days preceding the date of an election for Federal office,

1 submits an advisory opinion request pertaining to a proposed public communication referencing
2 a clearly identified Federal candidate.

3 The Commission notes that this new practice with respect to election-sensitive requests is
4 in addition to the Commission's current, informal practice of expediting certain highly
5 significant time-sensitive requests (whether or not relating to an upcoming election). The
6 Commission endeavors to issue advisory opinions within 30 days under this general expedited
7 process.

8 Withdrawal of Advisory Opinion Requests

9 A Requestor may withdraw an advisory opinion request at any time prior to the
10 Commission vote on the request. Such withdrawal may be done in writing, or on the record in
11 the event a Requestor appears before the Commission.

12 Summary of Advisory Opinion Timetable

13 The following is a summary of the advisory opinion timetable, as modified by this
14 program:

- 15 1) Requestor submits advisory opinion request;
- 16 2) Within 10 days of the submission of the request, OGC determines whether the request is
17 "complete" and "qualified," and shall notify the Commission whenever the initial request
18 is determined not to be complete and qualified.
- 19 3) The Commission shall provide 10 days for accepting written public comments on the
20 advisory opinion request after the request is released to the public.
- 21 4) One week prior to the open meeting at which the advisory opinion is to be considered
22 (three days for expedited requests), the Commission will provide at least one draft
23 response to the Requestor and the public for comment.

1 5) Requestor may submit a notice indicating that they will be available to respond to
2 questions from the Commission no later than 48 hours prior to the open meeting at which
3 the advisory opinion is to be considered.

4 6) In the event subsequent advisory opinion draft responses are made available to the public
5 and Requestor after one week (or three days for 20-day expedited requests) prior to the
6 open meeting at which the advisory opinion is to be considered, the Requestor shall have
7 an automatic right to appear before the Commission.

8 **II. Program Implementation**

9 The new procedures for Requestors to appear before the Commission described in
10 Sections I(B) through (D), *supra*, shall be in effect immediately upon the publication of this
11 notice. The Commission will evaluate the new procedures and consider whether the procedures
12 should, by an affirmative four votes of the Commission, be discontinued or modified. After one
13 calendar year, the program will continue as a pilot program until such time that the Commission
14 either terminates it by an affirmative four votes or makes it permanent by an affirmative four
15 votes.

16 On behalf of the Commission,

17
18 _____
19 Steven T. Walther
20 Chairman
21 Federal Election Commission
22
23

24 DATED: _____
25 BILLING CODE: 6715-01-P